KC CHAN BROTHERS DEVELOPMENT SDN BHD

v.

TAN KON SENG & ORS

HIGH COURT MALAYA, TEMERLOH
RAMLY ALI JC
[CIVIL APPEAL NOS: 11-1-2000 to 11-26-2000]
7 SEPTEMBER 2001

CIVIL PROCEDURE: *Appeal - Jurisdiction to entertain - Power of High Court to hear appeals from subordinate courts - Question of law - Whether substantially raised in notice of appeal or memorandum of appeal - Courts of Judicature Act 1964, ss. 27, 28*

CONTRACT: *Building contract - Breach - Defects - No notice as per sale and purchase agreement given to developer to repair defects - Whether purchasers may still sue developer for breach of contract - Whether purchasers estopped from bringing claim - Protection of house buyers - Housing Developers (Control & Licensing) Regulations 1982*

CONTRACT: *Building contract - Breach - Defects - Certificate of fitness for occupation issued by local authority - Whether purchasers precluded from suing developer for breach of contract - Whether specifications as per sale and purchase agreement and building plans met*

CONTRACT: *Building contract - Sale and purchase agreement - Approved building plans - Whether must be annexed to agreement - Whether a mandatory requirement - Whether may be deemed to have been annexed to agreement - Whether building plans part and parcel of agreement - Rights and liabilities of purchaser and developer - Housing Developers (Control & Licensing) Regulations 1982, reg. 12*

CONTRACT: *Building contract - Breach - Defects - Discovered after 12-month liability period - Whether purchaser may still sue developer for breach of contract under common law*

The 26 respondents (plaintiffs) herein had purchased low-cost houses from the appellant (defendant), a housing developer, and successfully claimed compensation on the ground that the houses were not constructed as per specifications in the approved plans which formed part and parcel of the respective sale and purchase agreements. The defendant was dissatisfied with the magistrate's decision – hence the instant appeal.

Held:

[1] The civil appellate jurisdiction of the High Court in respect of appeals from the subordinate courts is governed by ss. 27 and 28 of the Courts of Judicature Act 1964 ('the Act'), which stipulate that the monetary value of the subject matter in dispute must not be less than RM10,000 – save on a question of law. Here, in the absence of specific guidelines or provisions as to how a question of law has to be framed in the notice of appeal and/or the memorandum of appeal, a detailed scrutiny of the documents was enough to satisfy the court that there were substantial questions of law raised by the appellant to justify the court's decision to hear the instant appeal. (p 666 a-e)

[2] All the provisions in the sale and purchase agreement were statutory requirements to be strictly adhered to and cl. 23 in particular was meant as an additional protection for house buyers. Although the plaintiffs had failed to comply with cl. 23 of the sale and purchase agreement prior to initiating their claims in court, that did not deprive them of their contractual remedy under common law for breach of contract against the defendant. There was no merit in the contention that the plaintiffs were estopped from initiating their civil claim against the defendant. (p 669 a-b)

[3] By virtue of reg. 12(1) of the Housing Developers (Control and Licensing) Regulations 1982 ('the Regulations'), all sale and purchase agreements are deemed statutory contracts bound by the rules therein. It is a mandatory requirement of the Regulations that the approved building plans be annexed and incorporated into the sale and purchase agreement. Waiver or modification can only be made with the express written approval of the Controller. In the instant case, the defendant had failed to comply with the aforesaid regulation and should not be permitted to benefit from its own wrong doing. (pp 670 c-671 e)

[4] A Certificate of Fitness for Occupation ('CFO') is generally issued upon the completion of a house by the developer and after the relevant authority is satisfied that there is due compliance with the relevant provisions of the Uniform Building By-Laws 1984 ('UBBL'). Compliance with UBBL specifications need not however necessarily mean the automatic fulfillment of the specifications as per the sale and purchase agreement and approved plans annexed thereto, which are separate and distinct documents. The plaintiffs' rights as house buyers to claim compensation based upon specifications in the sale and purchase agreement and approved plans annexed thereto were not dependant on the issuance of a CFO. These

rights came under the umbrella of cl. 23 of the sale and purchase agreement and the common law remedies for breach of contract. (pp 671 g-672 c)

[5] Structural defects only manifest themselves after a period of occupation. Although cl. 23 of the sale and purchase agreement provided for a 12-month grace period, the plaintiffs should be permitted to enforce their rights under the common law for breach of contract. To determine otherwise would render the rights and protection granted to house buyers under statute and the common laws redundant. (p 672 e-g)

[Defendant's appeals.]

Case(s) referred to:

Chua Eng Hong & Anor v. Palm Springs Development Sdn Bhd [2001] 6 CLJ 298 ***(foll)***

City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69 ***(foll)***

Hock Hua Bank (Sabah) Bhd v. Lam Tat Ming & Ors [1995] 4 MLJ 328 ***(foll)***

Kannaya & Anor v. Teh Swee Eng [1994] 3 CLJ 54 ***(foll)***

Mohamad Safuan Wasidin & Anor v. Mohd Ridhuan Ahmad (an infant) [1994] 2 MLJ 187 ***(foll)***

Sulaiman Mohamad v. Malayan Banking Bhd [1992] 2 MLJ 116 ***(foll)***

Tan Yang Long & Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211, [1992] 3 CLJ (Rep) 666 ***(foll)***

Teh Khem On v. Yeoh & WU Development Sdn Bhd [1996] 2 CLJ 1105 ***(foll)***

Tiang Kwong Eee v. Ing Kai Hong (S) Sdn Bhd [2000] 5 MLJ 756 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 27, 28(1)

Housing Developers (Control and Licensing) Regulations 1982, regs. 11(1), 12(1), (2), 14

Housing Developers (Control and Licensing) Regulations 1989, regs. 11(1)

For the defendant/appellant - AM Sebastian (Bastian Pius Vendargon); M/s Anthony Sebastian & Co

For the plaintiffs/respondents - Francis Tan; M/s Rosni, Francis Tan & Ho

Reported by K Ganesh

JUDGMENT

Ramly Ali JC:

These are 26 appeals filed by the same appellant/defendant against 26 decisions of the learned magistrate Temerloh made on 29 January 2000 in favour of 26 different respondents/plaintiffs which arose from 26 separate civil suits. The appellant/defendant had filed 26 Appeal Notices on 10 February 2000 and later followed by 26 Memorandum of Appeal in respect of each decision.

Factual Background

All the respondents/plaintiffs were house buyers for low-cost houses built by the appellant/defendant at Taman Seraya, Triang, Pahang Darul Makmur. For that purpose, all the respondents/plaintiffs had entered into their respective agreements with the appellant/defendant. Out of the 26 respondents/plaintiffs, 13 of them were buyers for single-storey low-cost houses while the other 13, were buyers for double-storey low-cost houses. All the respondents/plaintiffs filed their claims separately against the appellant/defendant in the Magistrate Court Temerloh, claiming for compensation on the ground that their houses were not built in accordance with the specifications provided in the approved plans, which were part of the agreements. They claimed that the appellant/defendant had breached the agreements between them.

For the single-storey houses, the approved plan provides for the followings:

(a) the height of the house shall be 10 ft. from floor to ceiling;

(b) asbestos ceiling – to be installed;

(c) water PCC Vent – 2 layers;

(d) Roof rafters shall be from hardwood – size 2"x4";

(e) "hardcore" flooring;

(f) septic tank wall – 9 inches thick.

On delivery of the said houses, the respondents/plaintiffs found the followings:

(a) the height of the house, from floor to ceiling was only 9 feet;

(b) no asbestos ceiling installed;

(c) water PCC Vent – only 1 layer;

(d) roof rafters – were of various sizes and not from hardwood;

(e) no "hardcore" flooring;

(f) septic tank wall – only 4 3/4 inches thick.

For the double-storey houses, the approved plan provides for the followings:

(a) the height of the house shall be 20 ft. from floor to ceiling;

(b) asbestos ceiling to be installed;

(c) septic tank wall – 9 inches thick.

On delivery, the respondents/plaintiffs found the followings:

(a) the height of the house from floor to ceiling was only 18 ft.;

(b) no asbestos ceiling installed;

(c) septic tank wall – only 4 3/4 inches thick.

The appellant/defendant disputed the claim. The first case went on for full trial where the respondent/plaintiff (in that case) has called 16 witnesses. At the end of the respondents/plaintiff's case (in that case) both counsels for the respondents/plaintiffs and counsels for the appellant/defendant agreed that the facts and evidence adduced in the first case be also applicable to the other 25 cases. Along that line, the defence who has called three witnesses in the first case, was also to be applicable to all the other 25 cases as agreed by the parties.

At the end of the trial, the learned magistrate decided infavour of all the respondents/plaintiffs and found that the appellant/defendant was in breach of the respective agreements. In respect of the single-storey houses, the respective respondents/plaintiffs were awarded a sum of RM8,400 as compensation together with costs and interests (for each of them). While in respect of the double-storey houses, each of the respective respondents/plaintiffs were awarded a sum of RM4,5000 as compensation together with costs and interests.

The appellant/defendant, not being satisfied with all the 26 decisions, appealed to this court against all the 26 decisions separately and thus had filed 26 notices of appeal.

At the hearing of this appeal, both parties agreed to submit their written submissions which would be applicable for all the 26 appeals, as all the appeals involved the same set of facts and issues.

Whether The Said Decisions Are Appellable – Section 28(1), Courts Of Judicature Act 1964

It is not disputed that each and everyone of the 26 decisions involved award of less than RM10,000.

The amount in dispute or the value of the subject matter is less than RM10,000.

The appellate civil jurisdiction of the High Court in respect of appeals from subordinate courts is governed by s. 27 and 28 of the Courts of Judicature Act 1964. Section 27 of the Act provides:

> 27. The appellate jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts as hereinafter provided.

Section 28(1) of the same Act provides:

> 28(1). Subject to any other written law, no appeal shall lie to High Court from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject-matter is ten thousand ringgit or less except on a question of law.

For the purpose of s. 28(1). The amount in dispute or value of the subject matter shall not include interests and costs. It only refers to the main award. This finding is supported by the decision of Penang High Court in *Kannaya & Anor v. Teh Swee Eng* [1994] 1 MLJ 508, where it was held that:

> The value of the subject matter referred to in s. 28(1) of the Act does not include interest and costs. To interprete otherwise would be to place on unnecessary burden on Plaintiff who would have to decide in the first instance in which court to institute proceedings and further to guess as to when his case would be disposed of and its outcome. It cannot have been the intention of the legislature to have enacted this provision to invite the Plaintiff to first indulge in a guesing game as to the ultimate outcome of his action for the purpose of deciding in which court to institute proceedings.

Thus, based on the above finding, it is clear that the amount in dispute or the value of the subject matter in all the 26 appeals before this court is below RM10,000. It is also clear that by virtue of ss. 27 and 28(1) of the Courts of Judicature Act 1964, the High Court has no jurisdiction to hear these appeals except on a question of law. This is a question of jurisdiction which must be complied with strictly. It goes to the very core of the court's power in dealing with the appeal. Non-compliance with the provisions is fatal and would nullify the appeal. It is not a mere irregularity which can be cured by any other existing rules. It is a vital question to be determined and decided by the court at the beginning of the proceeding whether or not the respondent or any other party has raised it. The fact that the respondent does not raise the issue at the beginning of the proceeding does not mean that the court has the jurisdiction to hear the appeal even though the conditions set under s. 28(1) of the Act are not fulfilled.

That being the case, it is necessary at this stage for this court to be satisfied that the appeal is only on a question of law – ie, it involves issue on question of law raised by the appellant/defendant to be determined and decided by this court. It only covers issues on questions of law alone, nothing else.

Issues involving question of fact or that relate to the application of the law to the facts are clearly outside the jurisdiction of this court. (See *Mohamad Safuan bin Wasidin & Anor v. Mohd. Ridhuan bin Ahmad (an infant)* [1994] 2 MLJ 187; and *Tiang Kwong Eee v. Ing Kai Hong (S) Sdn. Bhd.* [2000] 5 MLJ 756.)

For that purpose, the court has to scrutinise the notice of appeal as well as the memorandum of appeal to see whether any question of law has been raised by the appellant. There must be same form of indication (ie, general indication) in the notice of appeal as well as the memorandum of appeal that a question of law has been raised. It need only be in general and need not be specific. In *Sulaiman bin Mohamad v. Malayan Banking Bhd.* [1992] 2 MLJ 116, Lamin J (as he then was) held:

> I am of the view that in the case of an appellant intending to appeal on a question of law, the notice of appeal in Form 140 must state at least in general form the question or questions of law that he wishes to appeal on.

In another case, *Mohamad Safuan bin Wasidin (supra)*, Abdul Malik Ishak JC (as he then was) has also ruled:

> In my judgment, in the case of an appellant intending to appeal from the decision of the subordinate court where the quantum is less than RM10,000.00, the notice of appeal in Form 140 must state generally the question or questions of law that he wishes to appeal on. Any failure to conform to this basic statutory requirement would strike at the very core of the appeal and, consequently, would nullity the appeal. For the reasons adumbrated above, I dismissed the appeal with costs.

The same ruling was also made by Tee Ah Sing J in *Ting Kwong Eee v. Ing Kai Hong (S) Sdn. Bhd. (supra)*. In that case he concluded:

> The failure to state in the notice of appeal in Form 140 the question or questions of law involved was fatal and would nullity the appeal.

In that case, the judge dismissed the appeal with costs on the ground that the appellant's notice of appeal did not state generally the question or questions of law that he wishes to appeal on.

In what format then, the question of law need to be stated in the notice of appeal? All the above authorities have stated that the question of law must be stated, at least in general form in the notice of appeal, but none has touched on the format of the statement. Form 140 itself does not help in this matter. The counsel for the respondents/plaintiffs contended the question of law must be formulated in the form of "question" to be answered by the court by using the opening word "whether ...". He further contended that the questions of law should not be in the form of a statement which says that "The learned magistrate has erred in law ..." or "The learned magistrate did not take into consideration issues and question of law ...".

Since there are no specific provisions or guidelines as to how a question of law need to be stated in the notice of appeal, then the court has to peruse the notice of appeal as well as the memorandum of appeal in detail in order to be satisfied that in substance a question of law alone has been raised. How and in what format the question was raised or stated is not that important. The substance is what matters. In this regard, I am in full agreement with Selventhiranathan JC (as he then was) in *Kanaya*'s case *(supra)* where at p. 513 he said:

> I also found that the second ground of objection to the appeal by learned counsel for the respondent has merit. I have perused the memorandum of appeal in detail and compared it with the grounds of judgment of the learned Magistrate. Having done so, I am satisfied that all the grounds of appeal in the memorandum at best relate to the application of the law to the facts and do not involve any question of law alone for decision. Labelling the grounds of appeal as involving questions of law does not metamorphose what are essentially question of fact into question of law. The substance is what matter, not the label.

In the present case, after going through the notices of appeal as well as the memorandums of appeal in detail, I am satisfied that, in substance, there are questions of law raised by the appellant/defendant for court's decision. The issues are as follows:

(a) whether the respondents/plaintiffs must have complied with the provisions of cl. 23 of the sale and purchase agreement first before initiating their claims in court;

(b) whether the magistrate can award compensation exceeding the maximum amount specified in the statement of claim;

(c) whether, based on the interpretation of reg. 11(1) of the Housing Developers (Control and Licensing) Regulations 1982, a copy of the approved building plan must be attached/annexed to the sale and purchase agreement; and

(d) whether, upon issuance of the Certificate of Fitness for Occupation (CFO), the respondents/plaintiffs are entitled to claim compensation from the appellant/defendant for non-compliance with the specifications or any other defect to the house.

The appellant/defendant has listed 12 issues in the notice of appeal and 21 issues in the memorandum of appeal. Except for the four issues which I have listed above that involved questions of law alone, all the other issues raised by the appellant/defendant do not involve any question of law alone for

decision. At best, those issues relate to the application of the law to the facts on the case. To my mind all those issues involve question's of fact which were decided by the learned magistrate after having heard all the witnesses. Whether to accept or reject their evidence, is a matter clearly within his province as long as he had valid reasons to do so. So, by vitue of s. 27 and 28(1) of the Courts of Judicature Act 1964, this court has no jurisdiction to entertain and to consider those issues. For the purpose of these appeals, I shall only deal with the four issues which I have cited above.

First Issue: Whether The Respondents/Plaintiffs Must Have Complied With The Provisions Of Clause 23 Of The Sale And Purchase Agreement First Before Initiating Their Claims In Court.

Clause 23 deals with defect liability period. In full, cl. 23 provides:

> 23. Any defects shrinkage or other faults in the said Building which shall become apparent within a period of twelve (12) calendar months after the date of handing over of vacant possession, with connection of water and electricity supply to the said Building, to the Purchaser and which are due to defective workmanship or materials or the said Building not having been constructed in accordance with the plans and description as specified in the Second and Fourth Schedule as approved or amended by the Appropriate Authority, shall be repaired and made good by the Vendor at its own cost and expenses within thirty (30) days of its having received written notice thereof from the Purchaser and if the said defects, shrinkage or other faults in the said Building have not been made good by the Vendor, the Purchaser shall be entitled to recover from the Vendor the cost of repairing and making good the same and the Purchaser may deduct such costs from any sum which has been held by the Vendor's solicitor as stakeholder for the Vendor:
>
> > PROVIDED THAT the Purchaser shall, at any time after expiry of the said period of thirty (30) days, notify the Vendor of the cost of repairing and making good the said defects, shrinkage or other faults before the commencement of the works and shall give the Vendor an opportunity to carry out the works himself within fourteen (14) days from the date the Purchaser has notified the Vendor of his intention to carry out the said works.

Ground (c) of the Notice of Appeal states that:

> Keputusan Tuan Majistret tidak mengambil kira isu tentang kegagalan Plaintif/ Responden atas Fasal 23 Peijanjian dan soal undang-undang samada Plaintif berhak menuntut gantirugi tanpa mematuhi Fasal 23 tersebut.

I have studied the grounds of decision by the learned magistrate (at pp. 508-535 of the Appeal Records) and fully satisfied that the learned magistrate has appropriately considered the issue relating to cl. 23 and has ruled that the respondents/plaintiffs need not issue the said notice under the clause, before

taking their actions to court. The appellant/defendant also argued that all the respondents/plaintiffs have failed to give any notice to the appellant/defendant under cl. 23, thus they are estopped from taking any action against the appellant/defendant in court. With respect I cannot agree with this argument.

All the relevant sale and purchase agreements in these appeals were signed between the respondents/plaintiffs and the appellant/defendant in 1990. These agreements were governed by the provisions of the Housing Developers (Control and Licensing) Act 1966 and the regulations made thereunder. At that time (1990), the relevant regulations were the Housing Developers (Control and Licensing) Regulations 1982 (the 1989 Regulations only come into force after 1990). Regulation 12(1) of 1982 Regulations provides that every contract of sale for the sale and purchase of a housing accomodation together with the subdivisional portion of land appurtenant there to shall be in the form prescribed in Schedule E. Regulation 12(2) further provides that no amendment to any such contract of sale shall be made except on the ground of hardship or necessity and with the prior approval of the Controller. In other words, all provisions in the sale and purchase agreement are actually statutory requirements which must strictly be complied with cl. 23, particularly is meant to be as an additional protection for house buyers, without effecting or limiting their rights under the common law. This finding was clearly confirmed by the Privy Council in *City Investment Sdn. Bhd. v. Koperasi Serbaguna Cuepacs Tanggungan Bhd.* [1988] 1 MLJ 69 where Lord Templeman has expressed (at p. 72):

> But the Act of 1966 and the Rules were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules.

The same cl. 23, has been dealt with by Peh Swee Chin FCJ in *Teh Khem On v. Yeoh & WU Development Sdn. Bhd.* [1996] 2 CLJ 1105 where he has said:

> I share the view espoused by Lord Denning in *Hancock & Ors. v. BW Brazier Ltd*. [1966] 2 All ER 901; [1966] 1 WLR 1317, to the effect that such clause similar to cl. 23 in our instant appeal about making good structural defects discovered within 6 months, would not take away the right to sue in respect of such defects which were not discoverable within such six months, and that further in regard those defects discovered within the six months, the provision of an express remedy of making good the same defects will not *ipso facto* take away the rights of any purchaser which normally follow at common law in the case of a breach of contract. It is pertinent to mention that our cl. 23 provides for 12 months instead of six months. The same principle would apply. Thus the said line of defence also fails.

On those authorities, I am of the view that the failure on part of the respondents/plaintiffs as house-buyers to issue any notice under cl. 23 of the sale and purchase agreements did not preclude them from initiating their civil claim under the common law for breach of contract against the appellant/ defendant in court. Consequently, the question of estoppel as raised by the appellant/defendant does not arise.

Second Issue: Whether The Magistrate Can Award Compensation Exceeding The Maximum Amount Specified In The Statement Of Claim

Originally, all the respondents/plaintiffs had limited their claim to not more than RM5,000 as stated in their respective statements of claim. Thus on that ground, the appellant/defendant contended that the magistrate cannot award compensation exceeding the amount. The appellant/defendant further submitted that the magistrate has erred in law when he awarded a sum of RM8,460 as compensation to each of the 13 respondents/plaintiffs who are house buyers in respect of single-storey houses. I have scrutinised the notes of evidence as well as the grounds of decisions of the learned magistrate and the pleadings, and I found out that eventhough intially all the respondents/plaintiffs have limited their claim to not more than RM5,000 each, however, in para. 5 of the amended statements of defence, the appellant/defendant has stated that the respondents/plaintiffs have no right to limit their claim as specified in para. 8 of their statements of claim. On that ground, the counsel for the respondents/ plaintiffs, at the Magistrate Court stage, admitted and agreed that the respondents/plaintiffs have no right to limit the amount of their compensation and submitted that the court then should be at a liberty to consider the amount of compensation based on the civil jurisdiction of a Magistrate Court to make an award of up to RM25,000, if damages are proven. In the premise, the limit initially stated by the respondents/plaintiffs in para. 8 of their respective statements of claim, has been abandoned and of no effect. Thus, the learned magistrate, after being satisfied that damages have been proven, was entitled to make an award of up to RM25,000. Therefore, the allegation that the learned magistrate has given awards of compensation exceeded the amount specified in the statements of claim should not arise at all.

Third Issue: Whether, Based On The Interpretation Of Regulation 11(1) Of The Housing Developers (Control and Licensing) Regulations 1982, A Copy Of The Approved Building Plant Must Be Annexed To The Sale And Purchase Agreement

In this issue, the appellant/defendant cited reg. 11(1) of the Housing Developers (Control and Licensing) Regulations 1989 as the basis of the argument. In actual fact, the 1989 Regulations only came into force after 1990 ie, after all the relevant sale and purchase agreements were duly signed by all the parties. Thus the 1989 Regulations were not applicable to those sale and purchase

agreements. The relevant Regulations that were applicable at the time when those sale and purchase agreements were signed, were the 1982 Regulations, ie, the Housing Developers (Control and Licensing) Regulations 1982. However the provisions of reg. 11(1) of the 1989 Regulations which was cited by the appellant/defendant, was in effect, the same with reg. 12(1) of the 1982 Regulations; and the form of the sale and purchase agreement as prescribed in Schedule G in the 1989 Regulations is the same with the form of the sale and purchase agreement as prescribed in Schedule E in the 1982 Regulations.

By virtue of reg. 12(1) of the 1982 Regulations, every contract of sale for the sale and purchase of a housing accommodation shall be in the form prescribed in Schedule E. Thus the sale and purchase agreements are not merely private contract between the developer and the house buyers, but are contracts in statutory form, containing statutory requirements which must be fully and strictly complied with; and as provided under reg. 12(2), no amendment to any such contract of sale shall be made except on the ground of hardship or necessity and with prior approval in writing of the Controller. Regulation 14 of the 1982 Regulations further provides that any person who contravenes any of the provisions of the Regulations shall be guilty of an offence and shall be liable on conviction to a fine not exceeding RM5,000 or to a term of imprisonment not exceeding three years or both. In the present case, there is no evidence to show that the Controller has given his written prior approval to amend the form of the sale and purchase agreement as prescribed in Schedule E. Thus, the original Schedule E is applicable. One of the recitals to the said Schedule E states:

> AND WHEREAS the Vendor has obtained the approval of the building plans (hereinafter referred to as "the Building Plan") from the Appropriate Authority, a copy of which is annexed as the Second Schedule;.

From this recital, it is clear that the approved building plan must be attached or annexed to the sale and purchase agreement and forms part of the agreement as Second Schedule. It is a mandatory requirement. RK Nathan J in dealing with reg. 11(1) of the 1989 Regulations (which in effect is the same with reg. 12(1) of the 1982 Regulations) in *Chua Eng Hong & Anor v. Palm Springs Development Sdn. Bhd.* [2001] 6 CLJ 298 has made the same ruling ie, that the sale and purchase agreement was in the statutory form and must be compiled with and cannot be waived or modified except with the approval in writing from the Controller.

Since the sale and purchase agreement was in the statutory form and by law, the approved building plan need to be annexed to the sale and purchase agreement, therefore the said approved building plan must be deemed to have been annexed and incorporated into the sale and purchase agreement although

in actual fact the plan was not annexed to the sale and purchase agreement at all. Thus the provisions and specifications contained in the approved building plan must be deemed to form part of the agreement and bind the parties concerned.

Hence, the maxim "equity treats as done that which ought to have been done" must apply to the present case. This was supported by Shanker J in *Tan Yang Long & Anor v. Newacres Sdn. Bhd.* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666 when he said:

> There was an immediate legal duty upon the part of Metroplex to reassign their rights under the agreement which they failed to do. Equity in this respect must regard that as done which ought to have been done.

In the present case, there was no evidence to show that the approved building plan, which was prepared by the appellant/defendant's Architect, has been annexed to the sale and purchase agreements. The appellant/defendant may have committed an offence under reg. 14 of the 1982 Regulations. Thus, the appellant/defendant should not be allowed to take advantage of his own wrong doing. In any event it is the law that no man can take advantage of his own wrong doing: *"nullus commodum capere potest defendant injuria sua propria"* (see *Hock Hua Bank (Sabah) Bhd. v. Lam Tat Ming & Ors.* [1995] 4 MLJ 328).

Fourth Issue: Whether, Upon Issuance Of The Certificate Of Fitness For Occupation (CFO), The Respondents/Plaintiffs As House-buyers, Are Entitled To Claim Compensation From The Appellant/Defendant For Non-compliance With The Specifications Or Any Defect To The Houses

The appellant/defendant argued that since the CFO to those houses were issued by the relevant authority, certifying that the houses were fit for occupation, the respondents/plaintiffs are not entitled to claim that the houses were defective for non-compliance with the specifications, and also not entitled to claim compensation from the appellant/defendant. However, the appellant/defendant did not cite any authorities to support this argument.

With respect, I cannot agree with this argument. I am of the view that the CFO, which in the present case, was issued by the relevant authority on 30 April 1991 (according to PW4), is to certify that the house in question is deemed fit for occupation. It is issued upon completion of the house by the developer and after the relevant authority is satisfied that the relevant provisions of the Uniform Building By-Laws 1984 (GN5178/85) (UBBL) have been complied with. The UBBL sets the minimum standards and specifications for the houses in question. However, the sale and purchase agreements together with the approved building plan are separate documents. The specifications

to the houses as contained in the sale and purchase agreement and the approved building plan may be different (but shall not be less favourable) compared to the Specifications in the UBBL. So, if the developer has satisfied the specifications in the UBBL, it does not necessarily mean that he has also satisfied or fulfilled the specifications in the sale and purchase agreement and the approved building plan.

The rights of the house-buyers to claim compensation for any defect or non-compliance with the specifications, do not depend on the issuance of the CFO. These rights are provided under cl. 23 to the sale and purchase agreement as well as under the common law for breach of contract. Clause 23 provides for defect liability period of (12) months after the date of delivery of vacant possession to the house buyers. Manner of delivery of vacant possession is provided under cl. 19 ie, upon the issue by developer's Architect of a certificate certifying that the construction of the building has been duly completed and the purchaser having paid all monies payable and performed or observed all the terms and covenants on his part under the sale and purchase agreement. However, such possession shall not give the purchaser the right to occupy and the purchaser shall not occupy the said house until such time as the CFO is issued. It is the duty of the developer to procure the issue of the CFO from the appropriate authority as provided under cl. 20 of the sale and purchase agreement. In reality, some defects or non-compliance of specifications can only be discovered when the purchaser has occupied the house for sometimes. That is why, cl. 23 gives a grace period of 12 months for the purchaser to discover the defects and non-compliance of specifications. After that 12 months period, purchaser may still enforce their rights under the common law for breach of contract. If the appellant/defendant's argument is to be accepted, then the rights and protection granted to house buyers under cl. 23 as well as under the relevant laws (particularly the Housing Developers (Control and Licensing) Regulations 1982 (now as amended in 1989) and the common law for breach of contract, would be useless and serve no purpose at all.

Conclusion

In view of the foregoing, I dismiss all the 26 appeals against all the respondents/plaintiffs with costs. Decisions of the learned magistrate in all the 26 cases are upheld.